UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 16-11700-smb

- x

In the Matter of:

GAWKER MEDIA,

Debtor.

- x

U.S. Bankruptcy Court

One Bowling Green

New York, NY 10004

February 14, 2017

10:45 AM

B E F O R E :

HON STUART M. BERNSTEIN

U.S. BANKRUPTCY JUDGE

ECRO: JONATHAN

Hearing re: Motion for Omnibus Objection to Claim(s) Number: 53, 202, 298 Notice of Debtors Omnibus Objection to Proofs of Claim Nos. 53, 202 and 298

Hearing re: Debtors' Omnibus Objection to Proofs of Claim Nos. 54,223, and 246 (Charles Johnson)

Hearing re: Motion for Entry of an Order Pursuant to 11 U.S.C. 365(f), Fed. R. Bankr. P. 6006, and LBR 6006-1 Authorizing Assignment of Certain Unexpired Nonresidential Real Property Leases to 204-210 Elizabeth Street LLC, (II) Fixing Cure Amounts in Connection Thereto, and (III) Granting Related Relief

Transcribed by: Sonya Ledanski Hyde

A P P E A R A N C E S :

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P R O C E E D I N G S

THE COURT: Good ahead.

MR. AGUDELO: Good morning, Your Honor. Jonathan Agudelo from Ropes & Gray for the Debtors. I'm here with my colleague, Ross Martin, also from Ropes & Gray.

MR. WOLMAN: Good morning, Your Honor. Sorry, I'm still rearranging the furniture.

THE COURT: All right. Go ahead.

MR. WOLMAN: Jay Wolman with Randazza Legal Group for Claimants, Charles C. Johnson and Got News, LLC.

THE COURT: Okay. Just before we start, what's going on in the case, if you know?

MR. AGUDELO: As my colleague, Mr. Galardi, reported at the last hearing, I believe, the Debtors have still not -- the effective date under the plan has still not occurred but is expected to occur in the next few weeks. Your Honor scheduled a status conference, I believe, for March the 22nd for that purpose, and the Debtors expect that by or around then, the effective date under the plan will have occurred.

THE COURT: Okay.

MR. AGUDELO: There are two matters on the amended agenda that we filed yesterday. One is an uncontested matter for a motion to assign leases and subleases; and the other one is a contested matter for which -- on the claim

objections for the claims of Mr. Johnson and Got News. The remaining matters originally scheduled for today's hearing have been adjourned with the Court's permission to the March 7th hearing date.

THE COURT: Let me deal with your motion to assign the leases. Does anybody want to be heard in connection with that. I think it's assigning subleases, technically. Hearing no response, I'll approve that motion. It seems like a pretty good deal for the Debtor to extricate itself from the property and get some money in return. So you can submit an order; you don't have to respond. Go ahead.

MR. AGUDELO: So, Your Honor...if I can, I'd just like to put on the record the economic terms, because a few of the amounts slightly changed.

THE COURT: Okay.

MR. AGUDELO: And I just want to state it for the record. So, specifically under the assignment, the landlord will make three payments in connection... There are two. First, the landlord will pay the Debtors 50 percent of the net profits that would be realized from the subleases through the end of the term, which the Debtors expect will be about $63,209. This is an updated upward number from the original amount in the motion.

Second, the landlord will reimburse the Debtors for the portion of the property taxes that the Debtors have

paid for this tax year. Originally in the motion, the figure was $42,722.92. The parties have agreed to revise downwards slightly to $40,389.73 to credit the landlord with the amounts that Gawker has received from the subtenants in respect to the property taxes.

And, third, the landlord will refund the Debtors -- the security deposits it's holding in respect to the leases. This amount has not changed. It's $315,203.53.

We did have -- the landlord asked for a few modifications to the proposed order. I can go through them or I can submit --

THE COURT: Why don't you submit a copy that's blacklined off of the order you included with your motion?

MR. AGUDELO: We will do that. Thank you, Your Honor. I will turn it over to Mr. Martin for a contested matter.

MR. MARTIN: Good morning, Your Honor. Ross Martin, Ropes & Gray, for the Debtors in Possession. We're here this morning on a further hearing on the Debtor's claims objections to Mr. Charles Johnson and related entity, Got News, LLC.

The Court at the last hearing we had, which was actually before confirmation, the Court had requested that a party submit additional briefing on two questions, and those are the questions raised here today. The first is the scope

of the so-called personal injury tort or wrongful debt claim's exception to the Bankruptcy Court's authority to hear and determine claims disputes. And the second is the question of to what extent the California Anti-SLAPP Statute should apply in the Court's determination of allowing or not allowing the claims.

There's obviously been extensive briefing on this, Your Honor. I'm happy to -- and I know the Court was actively involved at the last hearing so I'm not --

THE COURT: I reviewed the briefing. I have the briefs.

MR. MARTIN: Well, what I would say maybe in summary, Your Honor, and I'm happy to take questions, is that on the personal injury tort claim matter there are really two interpretive questions that are raised. The first is whether Got News, an artificial entity, not an individual, has a personal injury tort line. That's an independent question. We, in the supplemental papers --

THE COURT: Isn't that informed, though, by the question of whether or not personal injuries or bodily type injuries which a corporation can't suffer, or there's a broader notion that they include reputational injuries, commercial injuries, things like that?

MR. MARTIN: I see them as -- understanding the Court's point, I do see them as separate. And if you

looked, for example, at an issue that Judge Glenn faced in ResCap, which is not a reputational issue but emotional distress damages, that's clearly something that a corporation does not have. So, I would agree with the Court, maybe there's a little bit of an overlap here.

THE COURT: But once you get beyond bodily injury -- although emotional -- I recognize that emotional distress can cause bodily injury, but once you get beyond pure bodily injury, can you really distinguish Judge Glenn's decision?

MR. MARTIN: I'm not sure I fully understand the question of distinguishing Judge Glenn's decision. What I would say, Your Honor, is this -- is that on the question of whether an artificial entity can have the claim, there's -- on that question I think the text of the statute --

THE COURT: There are no cases that have considered this issue?

MR. MARTIN: There is one case that has rejected the notion. Agrees with us and rejected the notion that is cited in our papers. It's a Bankruptcy Court case. There's nothing above that. But we do cite a Supreme Court case, admittedly, it's a FOIA case, but deals with the question whether the phrase "personal privacy" in the statute can apply to corporations. Clearly an area where corporations can have the same kind of privacy concerns. But the Supreme Court specifically distinguished the term person, which is

often used in the United States code, to refer to all kinds of entities, both individuals and artificial entities, from personal, which it said expressed an intent to focus on individuals.

So, admittedly, FOIA is not the Bankruptcy Code -- we shouldn't pretend otherwise -- but otherwise that decision is foursquare on the question -- when Congress writes the word personal --

THE COURT: But we're not talking about the Bankruptcy Code; we're talking about Title 28.

MR. MARTIN: And that is a point we've also raised in our papers. Because as the Court raised at the last hearing, there is a reference in the Title 11 to personal bodily injury. One of the points we make in our papers, and I think this goes to the second question of why limit to bodily injury?

In the first instance, that's something, frankly, I didn't realize before until I went back to the supplemental briefing -- is that the definitions -- the way Title 11 itself is constructed in terms of the definitions in 101 and the rules of construction in Section 102 actually refer only to that title. The lead in to the definition --

THE COURT: Well, it's also kept by a different Congress.

MR. MARTIN: That is correct, although...

THE COURT: The Bankruptcy Code was passed in '78 and the Federal Judgeship Amendments were in 1984.

MR. MARTIN: That is correct, although to be fair -- because this is a... We saw a (indiscernible) effect, there's a split of authority in this district. So there's not a point in putting -- not putting the cards on the table here. It can be said that the '84 amendments also had amendments to Title 11. Not insubstantial ones. But in general we agree. And if you simply look at the language of the statute, Title 11, where it has definitions and instruction, those are, in fact, limited to -- in this title.

But to come back to the bodily injury point, I think the point I'd like to emphasize this morning, Your Honor, is the following: Because it appears following the supplemental briefing, the real dispute we have is not so much about legislative history and there'd be lots of disputes about how much we use that -- but really a fundamental question of how to think about what Congress was doing, or what the statute means. Should it be as my brother says, look to common law because the term is undefined? Or as we say, look to a contemporary meaning in the structure of the statute?

And on that point I want to make a very simple point going to our interpretation that it should be limited

to bodily injury. We know that in 1978, Congress obviously wanted to give the broadest possible authority to non-Article 3 courts. In fact, it was so broad, it was struck down in Marathon. And then they went back to the drawing board in the 1984 amendments and also made it quite broad -- in fact, we know now, actually that also was a little bit too broad.

Congress has repeatedly, in the structure of that statute, wanted to make it -- to give the Bankruptcy Courts as much authority as possible and make bankruptcy administration as efficient as possible. That is a major structural goal of the statute.

Now, there's no question that in 1984 there was a statutory -- not a constitutional issue but a statutory (indiscernible) effort to have a carve out for personal injury tort -- what turned out to be personal injury tort or wrongful death claims.

The way we think about it and the reason, I think maybe the core reason we think that it should be limited to bodily injury is because that is best in keeping with what the structure of the statute is trying to do, which is maximize the authority of the Bankruptcy Courts subject to a statutory carve out, but to not overly interfere with bankruptcy administration at the same time.

THE COURT: Aren't you just saying that where the

statute is ambiguous I should've gotten the narrow interpretation rather than a court interpretation in this particular circumstance? That's basically what you're saying.

MR. MARTIN: That is one way to view it. But for a reason, Your Honor. Not simply as a matter of rote interpretation. But one of the dangers in Judge Glenn's approach, it's not 100 percent clear to me how much he really disagrees with a little bit narrower approach. But one of the dangers of a case by case approach and not limiting it to bodily injury, which can be pretty easily determined, is that you're going to end up with a lot more cases that could potentially interfere with bankruptcy administration in different kinds of cases.

And there's no indication in the legislative history or the structure -- more importantly, the structure of the statute that Congress was trying to turn over all tort claims or some broad... They were clearly making an accommodation to a lobbying effort by the plaintiff's bar. That is just apparent on its face.

But what the Court has to discern, or any court facing this question has to discern is how broad did they really mean and what fits in the structure of the statute? And the thing that seems to us simplest for courts to determine covers really what is the core of what the

personal injury bar would have been concerned with are things that are bodily injuries.

THE COURT: Can I ask you a question? Suppose all the facts are as curved, and Mr. Johnson says, you know, what he did made me feel terrible. And there are physical manifestations and a doctor says he developed an ulcer, whatever. Does that then bring his injury within the exception?

MR. MARTIN: I do not think so. And I'll give the Court another example, which is --

THE COURT: So tell me where you draw the line.

MR. MARTIN: We draw the line at personal injury torts that are of their nature bodily injury focused torts. A car accident. The one example that's in the legislative history -- battery. Any other kind of physical...

THE COURT: Are you saying they all have to be impact injuries?

MR. MARTIN: I do, Your Honor.

THE COURT: That reminds me back to law school, of how the emotional infliction of mental distress developed.

MR. MARTIN: Correct. So Judge Glenn has a note in his ResCap opinion where he faced this question under a number of different states' laws, and the states had different law about what they require. And I found it interesting that -- a fact pattern that's similar to one

that Your Honor has raised is under Massachusetts law, intentional infliction of emotional distress requires a physical manifestation.

THE COURT: Physical impact or physical --?

MR. MARTIN: No, physical manifestation of harm. And Judge Glenn said that he dismissed -- that he had an example of that...he was referencing that he had made a decision about that in another claim case in ResCap, and that got me thinking about the exact question you raise. I don't think about intention of infliction of emotional stress, a physical impact kind of tort. And you can see from all the difficulty that Judge Glenn had dealing with it on a case by case basis, exactly why the rule should be looking at the statute, looking at the structure, looking at what we know about what Congress was trying to do, and the structure of trying to maximize bankruptcy efficiency while recognizing there was -- Congress made a carve out. There's no question about that.

But Congress wasn't trying to make a carve out and make bankruptcy administration -- create a whole bunch of additional things the Bankruptcy Courts were going to have to decide a margin about whether these were personal injury tort or wrongful death claims. That should be an easy threshold determination. And the natural reading, sitting there in 1984, is bodily injury torts. Because that way --

and we say this in our reply -- the most natural reading would cover bodily injury torts, survivorship actions for those torts, and wrongful death claims. And that really does sort of simply capture in a way that will not cause lots of case by case determinations, and does the most justice to what the statute is trying to accomplish.

THE COURT: Okay, why don't you move on to the other issue?

MR. MARTIN: On the anti-SLAPP issue, Your Honor, again, I think we've briefed this a fair bit, so I'll just try to summarize --

THE COURT: Well, one of the arguments -- one of the principal arguments is that it conflicts with the bankruptcy rules. And in those circumstances, the state procedure would ordinarily fall under usual jurisprudence. Tell me why it doesn't conflict with the bankruptcy procedures.

MR. MARTIN: It does not, Your Honor, because the bankruptcy -- start with the Bankruptcy Code itself. The Bankruptcy Code says you file a proof of claim, you sign it under penalty of perjury. That claim is allowed. Until an objection is filed, at which point it is not allowed. It's in this limbo state at that point under the code.

And then the Bankruptcy Code is clear. And the statutory language here is actually quite telling, because

under 502(b)1, what it says is the claim is disallowed -- it is unenforceable as a matter of any non-bankruptcy law.

THE COURT: Well, it's disallowed once an objection is filed. Those are the grounds for objections. The mere filing of an objection causes a disallowance of the claim under 502(b)1, I think. And then there's a litigation because the filing of the objection commences a contested matter.

MR. MARTIN: Well, if the Court were to interpret it that way --

THE COURT: That's how everybody interprets it. You are disallowed, and then, for example, if you're talking about plan voting, then you can make a motion under Rule 3018(a) --

MR. MARTIN: Correct.

THE COURT: -- to have your claim allowed for voting purposes in some specific --

MR. MARTIN: If that is the case, Your Honor, then even more so, this is -- the cause of action that is the basis of this proof of claim was filed in California State Court, it would not be -- if we're -- the anti-SLAPP law in California would make that claim unenforceable. There's a threshold determination on the paper with the additional affidavits from one side -- there's a threshold determination that has to be made, otherwise that claim is

simply --

THE COURT: Assuming somebody makes the special motion to (indiscernible)?

MR. MARTIN: That is correct. But as is noted, for example, in the Travelers case, the Supreme Court's Travelers case, every defense available is available to the trustee on the claims objection. So that really is fundamentally the point, Your Honor, is that...

Let me attack it one other way, Your Honor -- although this is talked about in the Raleigh case, for example. In bankruptcy you have a collective proceeding where you've got lots of parties in interest, often creditors, and, in fact, with respect to Gawker Media, that is the case. The Gawker Media estate has lots of creditors, including the Gawker Hungary entity on an intercompany claim -- all that's been settled. And the Got News and Johnson claims are one claim against that particular entity.

Those entities all have claims they might enforce in lots of different fora. And the logical way to deal with all those is for Bankruptcy Courts to ask the question -- if they all went and got judgments in all their different places, that's what the lead-in to 502 effectively says: the claim is allowed in lawful currency in the United States as the petition date. If everybody got judgments in whatever they could go get them, what's the number they

would bring? And then we'd whack it up against the assets of the estate.

In that circumstance, having the Bankruptcy Courts do their best under flexible claims administration procedures, which the Bankruptcy Courts have complete flexibility to control -- it's not like an adversary. The Bankruptcy -- in a contested matter, the Bankruptcy Court can put in and out the various part 7 rules. But the Bankruptcy Court's job is to best mirror what would have happened if they got a judgment so you know what the distributive share is. And that makes sense as a matter of bankruptcy policy.

Mr. Wolman's clients have a claim originating in California, Mr. Tabek's clients had claims originating in Florida --

THE COURT: Let me ask you a question, putting aside the bankruptcy issue and the objection to the claim. Suppose California law said you had to file an answer to a complaint in ten days or you were in default. And let's say the Southern -- the federal rules say you have to file an answer within 30 days or you're in default. And they file their answer in 20 days. Do I apply California law to cut off that claim?

MR. MARTIN: No, Your Honor.

THE COURT: Why not?

MR. MARTIN: I think for two reasons. That is an instance where the bankruptcy rule passed under the Bankruptcy Code -- the Rules Enabling Act for Bankruptcy Jurisdiction... It is 100 percent clear that the time to respond is 30 days. And, in fact, I believe that's one of the rules --

THE COURT: The reason I asked the question -- I know what the rules say -- the reason I asked the question is, you're saying that a Federal Court or a Bankruptcy Court is supposed to mirror and leave in this case the creditors exactly where they would be if they had litigated this case in State Court, win or lose. And what I'm suggesting is a scenario, purely procedural, where they would lose in State Court but not necessarily in the Bankruptcy Court -- or Federal Court.

MR. MARTIN: Correct.

THE COURT: So, in mirroring the result of a State Court litigation where I say, you lose even though your answer isn't really laid under the federal rules of civil procedure.

MR. MARTIN: Well, in that circumstance, Your Honor, for example, there's a separate statutory reason that -- if it's a failure of the plaintiff in that circumstance to file the paper by the deadline, there's actually a separate statutory provision aside from 502, the automatic

stay would prevent them from actually filing that paper.

THE COURT: Let's take bankruptcy out of it. I said take bankruptcy out of it. Let's just assume it's a litigation... Let's say this litigation started in California and went to the Southern District of New York for whatever reason. And they were in default because they didn't file their answer in a timely fashion under California law, but they're not in default under federal rules and civil procedure.

MR. MARTIN: So, let me --

THE COURT: If the Federal -- assuming the Federal District Court is supposed to do the same thing the Bankruptcy Court does, and that is mirror the case as if it was filed -- as if it was to transfer (indiscernible) court, which is what I think the law is, do they then lose?

MR. MARTIN: Let me say this. First, Your Honor, I think the diversity question is different than the bankruptcy question. I think we've been very clear about that. I actually think that -- it's one of the reasons I focus on the language of the 502(b)1, because theory -- those questions are a separate set of questions about diversity jurisdiction and what Congress can do. And the question here is -- in bankruptcy I actually think it's somewhat broader, but let me come exactly to the fact that the Court raises, which is -- let's say that...Mr. Wolman's

client had filed their complaint, and we had filed a motion to dismiss, and they had failed to respond under the time permitted in California, and then we had filed a petition in bankruptcy.

So, they had defaulted under California -- procedurally defaulted under California law at that point, but perhaps the California court has not entered the final determinative judgment on that question.

THE COURT: Mm hmm.

MR. MARTIN: I think I have the fact pattern correct. And, meanwhile, a bankruptcy case has been filed. In that circumstance, I think the claim is disallowable. They defaulted under California law. And I think this Court can take that... I think under... If I understand the fact pattern correctly --

THE COURT: I'm not sure I agree with you in the absence of an order form the California court entering a default judgment. I'm not sure I agree with you.

MR. MARTIN: The default scenario is -- it is an interesting one, and I would respectfully disagree with the Court on the example. That's what oral argument is about. But I would also note that defaults are lifted for lots of discretionary reasons, so it's not quite the same fact pattern as where -- as anti-SLAPP, where the legislature has -- the California legislature has imposed a very specific

test and a very specific process.

THE COURT: Do you -- I don't think you did, but has either side cited any cases where anti-SLAPP has been applied to a bankruptcy claim objection?

MR. MARTIN: No. And it's been applied on the claims outbound from the estate, but I'm not aware of any where it's been applied in the claims.

THE COURT: Or where it's been -- or where somebody said, I disagree; it doesn't apply in the claim objection scenario? In other words, it's never been litigated.

MR. MARTIN: I do not -- Your honor, I do not believe it's been litigated before.

THE COURT: Okay.

MR. MARTIN: If the Court doesn't have further questions for me at that moment, that's what I have.

THE COURT: I'll hear from Mr. Wolman.

MR. MARTIN: Thank you very much, Your Honor.

THE COURT: Thank you.

MR. WOLMAN: Good morning again, Your Honor.

THE COURT: Let me start with the question that I had asked on the personal injury aspect of this. If -- you know, I have the Madoff case and a lot of people who were victims of Madoff have suffered not only financial injury but all sorts of emotional injuries, psychic injuries, which

manifest themselves in identifiable physical injury.

Under those circumstances, if a person brought a fraud claim in that situation, would that be a personal injury tort claim that's at least a non-core proceeding?

MR. WOLMAN: Thank you, Your Honor. Fraud --

THE COURT: I'm really talking about the physical manifestations of something that you wouldn't normally associate --

MR. WOLMAN: I understand, Your Honor.

THE COURT: -- with kind of a bodily impact type tort.

MR. WOLMAN: I think Your Honor's taking an approach that the statute's not contemplating.

THE COURT: I don't know what the statute is --

MR. WOLMAN: If I may --

THE COURT: I mean, I think I have an idea. At least I know how it came about but it's not --

MR. WOLMAN: The reason why I'm saying that is because my brother cited Massachusetts law; under Chapter 93A Massachusetts you can get emotional distress damages. Those are not --

THE COURT: Where do you draw the line, is the question.

MR. WOLMAN: Certainly. What we're looking at here -- and that's why wrongful death actually is quite

informative -- is the statute contemplates personal injury claims, which, under the contemporary understanding in 1984, even Black's Law Dictionary cited by them, under the entire history of personal injury law -- because my brother and the Debtor have cited no case prior to 1984, where personal injury was interpreted as not including slander or libel -- in common law, personal injury includes these reputational harms going back to Blackstone.

THE COURT: But if you look at Black's, which you just mentioned, personal injury is synonymous with bodily injury, and other types of torts are referred to as private injury.

MR. WOLMAN: It doesn't really, though, provide --

THE COURT: You can find a source that will support any argument.

MR. WOLMAN: But then the problem is Black's is just Black's. The entire case history, as we set forth, shows that -- if I may, Your Honor --

THE COURT: I'm just trying to cut to the --

MR. WOLMAN: -- personal injury is equivalent to injury of the person under law. And that's what --

THE COURT: It sounds to me like what you're saying is there's a traditional notion of what a personal injury is. It includes slander, and that's what Congress was thinking about, as opposed to thinking about the types

of tort injuries that were on the minds of the asbestos plaintiffs lawyers who were pushing this amendment.

MR. WOLMAN: Exactly, Your Honor. Because wrongful death had to be a statutory cause of action, even though you and I might think of course a wrongful death is a personal injury.

THE COURT: Do you think that Congress was thinking about survival actions and actions that die with the victim when it tagged on wrongful death to personal injury torts? Or were they thinking -- or was the concern about people with mesothelioma, and lung cancer, and things like that from asbestos who don't survive?

MR. WOLMAN: The reason it would need to be added is because it does not fit within the traditional common law notion of what is a personal injury claim under state law. State by state, every state has a different law.

THE COURT: So, why wasn't this exception in the original '78 amendments...?

MR. WOLMAN: Congress does plenty of things that don't contemplate the necessary outcome for it. But when they were going back in '84, some lawyers, obviously lobbyists, thought about the implications --

THE COURT: Who had just read Blackstone, no doubt.

MR. WOLMAN: I'm sorry?

THE COURT: Who had just read Blackstone.

MR. WOLMAN: But the entirety of the legal history refers to injury to persons being synonymous with personal injury. The entire history of the concept of personal injury for the last 200 years, 250 years, includes these types of actions.

THE COURT: Does the restatement of torts define personal injury?

MR. WOLMAN: I actually did not refer to restatement. I'd be happy to look, Your Honor.

THE COURT: I can look.

MR. WOLMAN: But if I may, that's why, for example, I didn't refer to FCC v. AT&T because there the statutory term is not a common law phrase, whereas the Supreme Court action took care to distinguish personal jurisdiction -- applies to companies because it also is synonymous with in personam actions.

THE COURT: Well, you know, personal is an adjective that's attached to a lot of phrases and means different things. A personal injury can be synonymous with a direct injury as opposed to a derivative injury. So, you can read a lot of cases that took about what personal means -- (indiscernible) case, it might have an entirely different context.

But I come back to my broad question. Wasn't

fraud a personal injury tort in common law?

MR. WOLMAN: I believe fraud was an injury to property; not an injury to person. And that's what the difference is. A slander is an injury to person or a personal injury, as the case law shows that they are synonymous terms.

THE COURT: One of your claims for existence is invasion of privacy, as I recall, isn't it?

MR. WOLMAN: There's a false (indiscernible), yes, Your Honor.

THE COURT: Right. And that was not really a tort of common law until Louis Brandeis and Charles Warren wrote an article about it and the concept of the right of privacy arose out of that. So, do you think that that is a personal injury tort if it wasn't a tort of common law until this law review order?

MR. WOLMAN: If I may...the underlying terms refer to -- and the origin of personal injury claims and injury to person refer to -- your slander and libel fit is right of personal security. And I would suggest an invasion of privacy claim falls along an invasion or violation of the right of personal security.

THE COURT: But if it wasn't a tort of common law, it doesn't fit within your argument that Congress intended for common law torts -- common law personal injury torts in

--

MR. WOLMAN: Well, the courts created a common law tort. It's not a statutory tort; it's a common law tort --

THE COURT: Well, it is -- I think it is a statutory tort. Invasion of privacy.

MR. WOLMAN: It depends on the state you're in.

THE COURT: Right. I know I had a case in Florida where -- some Florida --

MR. WOLMAN: Florida does have a statute, yes, Your Honor. Many states do not.

THE COURT: All right, why don't we move on to the anti-SLAPP? And the first question I have is if this were a Federal District Court, in other words, the case had been transferred to a Federal District Court a mile north, is there any question that the anti-SLAPP provisions of California law would apply?

MR. WOLMAN: The 2nd Circuit has not specifically weighed in. There have been questions back and forth. And so, is Your Honor suggesting under removal jurisdiction?

THE COURT: Well, let's say that the same thing happened... I'm essentially a transferee court under Coudert, and if instead of the case coming here because of the bankruptcy filing, the California District Court transferred the case to the Southern District of New York for whatever reason. So, the Southern District... New York

is also a transferee court in that sense. Would the California Anti-SLAPP Statute apply to that litigation so that the defendant could make the motion that it's essentially (indiscernible) -- and that Gawker is essentially making this?

MR. WOLMAN: I'm going to duck Your Honor's question for just a second here.

THE COURT: Okay. But you'll come back to it, though?

MR. WOLMAN: Yes. Because in California -- this was a state action, but let's say --

THE COURT: Did this start as a state action?

MR. WOLMAN: Yes, Your Honor.

THE COURT: Okay.

MR. WOLMAN: Let's say Gawker had removed to Federal Court, as it did in Missouri, and then filed an anti-SLAPP motion. The 9th Circuit certainly has permitted, although it's called -- Judge Kazinski has called into question under removal jurisdiction --

THE COURT: It's clearly a law of the 9th Circuit.

MR. WOLMAN: Of the 9th Circuit.

THE COURT: And California.

MR. WOLMAN: And California, where much of the anti-SLAPP statute applies but not all of it. The Court recently -- 9th Circuit recently ruled that there is no

interlocutory appeal. The 9th Circuit has said it does not need to be limited to -- filed with 60 days. The 9th Circuit has said that the automatic stay of discovery does not apply.

And arguably a 2nd Circuit court may well agree with the 9th Circuit on that. However, I would respectfully submit that it's a little different when you're filing a proof of claim because it is not a removed case that's been transferred directly or referred directly. What we have is a separate filing where, as I said, the issue here, the only things that are left are these -- this burden-shifting framework and then fees of your successor, which you don't even get to then if you don't get to the burden shifting.

But what is the purpose of the burden shifting framework when a proof of claim already meets the burden? It is deemed to --

THE COURT: But -- all right, stop, stop. Even where anti-SLAPP applies, you could survive a motion to dismiss under 12(b)6 but still lose an anti-SLAPP motion, right?

MR. WOLMAN: That is feasible, yes, Your Honor.

THE COURT: All right, so, even if your claim was legally sufficient, which is really what we're saying under the bankruptcy rules -- are you saying that the bankruptcy rules provide more than legal sufficiency?

MR. WOLMAN: Yes.

THE COURT: I guess you're right. They have evidentiary effect.

MR. WOLMAN: Evidentiary. And that's where the bankruptcy procedural rules differ from the federal rules of civil procedure. And that's why I would say perhaps it might apply in a removal case but not here because we already have --

THE COURT: All right. I understand.

MR. WOLMAN: -- an evidentiary... We've already met the evidentiary burden before they filed their motion.

THE COURT: But, obviously, they're free to make a motion for summary judgment even in a contested matter.

MR. WOLMAN: Certainly. Meaning the prima facie evidentiary standard does not mean you win the case. You see that all the time in employment discrimination claims.

THE COURT: No, I know. I realize that 3001 is an evidentiary boost, not just a legal sufficiency boost.

MR. WOLMAN: Correct. And so, once we met the prima facie case, there is no purpose to burden shifting left, so there's nothing left substantive and this is not changing the ultimate burden of proof of the case. Of course the claimants always have, at the end of the day, the ultimate burden of persuasion. Nobody's denying that. They have that whether or not an anti-SLAPP motion is filed.

THE COURT: I have another question. What happens to the presumption if the Debtor makes a motion that has contrary evidence -- that goes back to whether the presumption just disappears from the case or it still has some validity. In other words, they used to be, or there may be two theories of what happens to a presumption when the party submits evidence contrary to the presumption.

MR. WOLMAN: Then that goes to the ultimate --

THE COURT: Well, no, but if the presumption disappears, then your objection to the SLAPP motion is less convincing because they submit evidence presumably as part of the motion that shows that you don't have a high probability of success. And then what happens?

MR. WOLMAN: Your Honor, I'm not aware --

THE COURT: Can you still rely on the presumption?

MR. WOLMAN: -- of the presumption disappearing. A presumption can be overcome...

THE COURT: Well, there are different theories in evidence about what happens to a presumption. I was just wondering what would happen in this case.

MR. WOLMAN: I would say that in that case you can overcome a presumption but not that the initial underlying presumption --

THE COURT: That's the result you'd like but I don't know if that's the law. Go ahead.

MR. WOLMAN: And I would suggest, you know, Gawker's had four briefs; we've had two. Gawker hasn't said that the presumption disappears.

THE COURT: Okay, fair enough.

MR. WOLMAN: Is there anything --

THE COURT: No. Thank you.

MR. WOLMAN: Thank you, Your Honor.

THE COURT: Do you have anything else?

MR. MARTIN: If I might just respond to two questions that -- just perhaps it was (indiscernible). Obviously (indiscernible). On the question that the Court raised about transfer of the action from California back to here, to take Mr. Wolman's example, I think that some care should be taken because there's a circuit split on the question of whether anti-SLAPP applies.

THE COURT: I thought the 2nd Circuit said -- I don't know if it was California -- maybe it was a California case -- that it basically sits as a 9th Circuit court or bound by 9th Circuit law in this situation that I describe?

MR. MARTIN: Yes, Your Honor, yes. And the second issue that I wanted to raise, Your Honor, was as to the restatement, which obviously the Court can look at as well, but it's actually a somewhat contemporaneous secondary statement towards a somewhat contemporaneous round of that time, with a lot of uniform law projects.

We were actually looking at that in preparation for this hearing. And, for example, the restatement groups torts into bodily injury, kind of a set of bodily injury torts, as opposed to privacy kind of torts. So I would commend that to the Court to...

THE COURT: Do you know what section that is?

MR. MARTIN: I don't remember the number off hand.

THE COURT: Is that the restatement -- second or third at this point?

MR. MARTIN: Second.

THE COURT: Does it define personal injury?

MR. MARTIN: It does not, I believe, Your Honor. Interestingly enough, in the interest of a colloquy, it's assault, battery, false imprisonment, I think, and a malicious... But it's a set of attacks on the person. And I think it can be read to say that is what was commonly understood. Obviously the mesothelioma situation was foremost in their minds but, again, and I'll sit down after this, I think that taking into account the ease of bankruptcy administration and not making this a case by case issue and having clear minds around that is important. Thank you, Your Honor, for a tremendous amount of time on this issue.

THE COURT: Thank you.

MR. WOLMAN: Your Honor, if I may just make one

quick point on the restatement. I believe false imprisonment is one of those pauses that's traditionally a violation of the right of personal security under which libel and slander also derive as personal injuries.

THE COURT: Well, it doesn't shock me that falsely imprisoning somebody is a personal injury tort.

MR. WOLMAN: True. But it does not injure the body of the person; it interferes with their right of personal security, which is also the same thing where libel and slander arise as personal -- that's injuries to person.

THE COURT: But assault doesn't injure somebody either under the law -- common law torts. But it's a personal injury.

MR. WOLMAN: I agree. I completely agree, Your Honor.

THE COURT: All right. All right, thank you very much. I just want to see counsel inside for a couple of minutes. Just give me a couple of minutes to clean up my desk. Thanks.

(Whereupon these proceedings were concluded at 11:28 AM.)

C E R T I F I C A T I O N

I, Sonya Ledanski Hyde, certified that the foregoing transcript is a true and accurate record of the proceedings.

Sonya Ledanski Hyde

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